OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 84- 10

June 7, 1984

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Wilford W. Johansen, Acting General Counsel

SUBJECT: Guideline Memorandum Concerning Olin Corporation, 268 NLRB No. 86

In Olin Corporation, the Board reaffirmed the Spielberg principle 1/ that the Board will defer to an arbitral award "where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act." 2/ The Board also reaffirmed the principle that deferral is conditioned on the arbitrator's having considered the unfair labor practice issue. 3/ However, with respect to the latter two elements, the Board set forth the following test:

> "We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

1/ 112 NLRB 1080.
2/ Olin at p. 3.
3/ Olin at p. 4.

Finally, the Board placed a burden on the party seeking to avoid deferral. In this regard the Board said:

> "We would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.

Accordingly, in cases where there is an arbitral award, the Region must examine the award, and the underlying proceedings, to determine whether the award meets the aforementioned tests. The Region should proceed with the handling of the case only if it can show that one or more of the deferral elements has not been met.

With particular respect to the question of whether the arbitrator "adequately considered" the unfair labor practice issue, the Board's position can best be understood by the application of that position to the facts of Olin and to other illustrative unfair labor practice cases.

In Olin, the charge alleged that the employer had discriminatorily selected the union president for discharage because of his union position and activities. The employer's defense was that it discharged the union president because he had special obligations under the collective bargaining agreement and he had breached those obligations.

It is clear that the arbitrator adequately considered and resolved the issue thus posed. The arbitrator found that the president had "at least partially caused or participated" in a work stoppage that violated the no-strike clause of the contract. The no-strike clause specifically provided that a union officer would not "cause or permit [union] members to cause any strike." The arbitrator therefore concluded that the president's conduct contravened his obligations under the contract. The arbitrator also concluded that there was "no evidence that the company discharged [the union president] for legitimate union activities." Accordingly, the arbitrator upheld the discharge.

Thus, the issue that was considered by the arbitrator was "factually parallel to the unfair labor practice issue". In essence, the arbitrator upheld the employer's contention that it discharged the union president because he breached special obligations under the contract. Further, the arbitrator was "presented generally" with the facts relevant to resolving that issue. Accordingly, the arbitrator's decision met the Spielberg test of "adequate consideration" of the unfair labor practice issue.

These same principles can be applied to a more typical Section 8(a)(3) case, i.e. a case in which it is alleged that an employee was discriminatorily discharged for his union activities. If the grievance alleges that the discipline was in derogation of a clause forbidding discrimination because of union activities, the contractual issue would be factually parallel to the unfair labor practice issue.

Assuming that the arbitrator is presented generally with the facts relevant to resolving that issue, the arbitrator would be said to have adequately considered the unfair labor practice issue.

The same result can obtain if the grievance alleges that the discipline was in derogation of a contract clause requiring that discipline be for "just cause". If the grievant contends, inter alia, that the discipline was imposed in retaliation for union activities, and that such discipline was therefore not for "just cause", the contractual issue would be factually parallel to the unfair labor practice issue. And, assuming that the arbitrator is presented generally with the facts relevant to resolving that issue, the arbitrator would be said to have adequately considered the unfair labor practice issue.

The case discussed immediately above should be contrasted with one in which the grievant simply contends that the employee was innocent of misconduct and/or that such misconduct does not warrant the discipline imposed. Assuming that the arbitration is confined to the issues thus posed, these issues would not be factually parallel to the unfair labor practice issue. That is, the arbitrator would not consider the issue of whether the real reason for the discharge was the union activity of the employee. 4/ Accordingly, there would be no warrant for deferral to that award.

These same principles can be applied in Section 8(a)(5) cases. For example, if the unfair labor practice charge alleges that certain conduct constitutes a modification of a provision of a contract in violation of Section 8(a)(5) - 8(d) of the Act, and if the grievance alleges that such conduct is in breach of that provision of the contract, the contractual issue is factually parallel to the unfair labor practice issue. Accordingly, if the arbitrator is presented generally with the facts relevant to the issue, and concludes that the employer's conduct was in conformity with the provisions of the contract, it would appear that the arbitrator has adequately considered the unfair practice issue.

On the other hand, if the grievance alleges a breach of contract and the Section 8(a)(5) charge alleges a unilateral change, the issue may not be factually parallel. Thus, the issue raised by the grievance is whether the conduct breached a provision of the contract. The issue raised by the charge is whether a unilateral change was made with respect to a mandatory subject of bargaining. These issues are not factually parallel. To resolve the former issue, one starts with the proposition that the employer can make the change, unless the employer has agreed not to do so. To resolve the latter issue, one starts with the proposition that the employer cannot make a unilateral change with respect to a mandatory subject of bargaining, unless the union has clearly and unmistakably waived its right to bargain about the subject.

4/ The mere fact that the grievant had the opportunity to present this issue to the arbitrator would not be sufficient to warrant deferral to the arbitral award. See Olin at n. 10.

However, the statutory issue of waiver may itself be factually parallel to a contractual issue. Thus, for example, if the employer argues in arbitration that a contractual clause privileges its conduct, an arbitral decision agreeing with the employer may be dispositive of the waiver issue. To be sure, there may be a question as to whether the arbitrator's resolution of the issue is repugnant to the Board's standards on waiver. However, as noted supra, the Board has made it clear in Olin that:

> We would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Thus, if an arbitrator concludes that a given clause privileges the employer's conduct, the Region can defer to the arbitral decision, even if there is Board precedent that such a clause would not constitute a waiver.

Finally, it bears repetition that the party who seeks non-deferral to an award has the burden of showing that one or more of the Spielberg-Olin standards has not been met. Thus, for example, if the arbitral award, on its face, does not reveal whether the arbitrator adequately considered the statutory issue, the Region should gather evidence concerning the question of what issue was tendered to the arbitrator and the question of what facts were presented to the arbitrator. The Region can proceed only if that evidence shows that the arbitrator did not adequately consider the statutory issue.

If there are cases which present Spielberg-Olin issues which are not resolved by Spielberg-Olin or this memorandum, the Region should submit these cases to Advice.

W.W.J.

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